Supreme Court, U.S.
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No. 05-___

IN THE

Supreme Court of the United States

ROGER W. LONG, by and though his mother, guardian and conservator, JACKLYNNE EVE LONG,
Petitioner,

v.

TITAN INSURANCE COMPANY,
a Michigan Insurance Company
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Michigan

---

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. When the Michigan No-Fault Automobile Insurance Act and scheme, MCL 500.3101 *et seq.*, has no tolling provisions for its one year statute of limitations, MCL 500.3145(1), and when Petitioner was at all pertinent times continuously either comatose or otherwise catastrophically injured, incapacitated and incompetent, would the State Court's inflexible application of this one year statute of limitations to bar Petitioner's claim, run afoul of the Fourteenth Amendment to the United States Constitution and unconstitutionally deprive him of his right of action without due process of law?

PARTIES TO THE PROCEEDING

There are no parties to the proceeding other than those listed in the caption.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Roger W. Long, by and through his Guardian and Conservator Jacklynn Eve Long, respectfully prays that a writ of certiorari be issued to review the Order of the Supreme Court of Michigan denying application for leave to appeal from the Judgment of the Michigan Court of Appeals, which in turn affirmed the Michigan lower court's Order dismissing Petitioner's state court action. In plain contravention of the requirements of Due Process, within the Fourteenth Amendment of the Constitution of the United States, the State of Michigan judiciary failed to in any way expand or toll its statute of limitations to accommodate an injured man's mental incompetence, blindness and quadriplegia.

OPINIONS BELOW

The Order of the Supreme Court of Michigan is reported at 708 N.W.2d 379; 2006 Lexis 120 (January 27, 2006). The Judgment of the Court of Appeals is unpublished and was reported at 2005 Mich. App. Lexis 1442 (Mich Ct. App., June 14, 2005). The Opinion and Order of the lower court, Oakland County Circuit Court, was not reported. Each are included in the appendix beginning at 1a.

JURISDICTION

The Order of the Supreme Court of Michigan was entered January 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

The Petitioner specifically and expressly raised his Constitutional arguments in the Michigan lower court, the Michigan Court of Appeals and in his Application For Leave to the Michigan Supreme Court. Although the Michigan decision may have generally addressed the constitutionality of a one year statute of limitations, each decision appears to have entirely side-stepped the central issue, which is the refusal to apply any statutory tolling provisions to the statute of limitations under any circumstances. It should have considered the dire incapacitating medical circumstances presented during the horrific two years after the motor vehicle accident for this blind quadriplegic Petitioner, leading up to the time when he finally, with the assistance of family, obtained counsel, obtained a conservator and filed his ultimately time-barred state action for insurance benefits.

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the Constitution of the United States provides, in pertinent part: "No State Shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without

due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. Amend XIV,§ 1.

Michigan's No-Fault Act, MCL § 500.3101 *et seq.*, does not contain any explicit tolling provisions. The statute of limitations involved in this matter is contained within MCLS § 500.3145 which states as follows:

> Sec. 3145. (1) An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury.
>
> (2) An action for recovery of property protection insurance benefits shall not be commenced later than 1 year after the accident.

STATEMENT OF THE CASE

The facts are not in dispute. The standard for the summary dismissal motion under MCR 2.116(C)(7) in State Court

required that the State Court "accepts all well pleaded factual allegations as true, unless contradicted by other evidence, and construes them in favor of the non-moving party." *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Hence, for purposes of the summary disposition motion, potential factual issues such as the existence of a motor vehicle accident or the severity of Petitioner's injuries and incompetence had to have been considered in the light most favorable to Petitioner. Since it was uncontested that the applicable limitations period was one year under existing Michigan law, and that Petitioner did not and could not personally provide notice to his insurer, let alone written notice, and that notice was not provided to insurer until more than two years after the motor vehicle accident, a pure issue of constitutional law presented itself to be decided by the Court.

Although he may have had memory for the motor vehicle accident during the initial day of the accident, after hemorrhaging and losing consciousness, Roger W. Long has had no memory for the accident that occurred in Michigan on May 29, 2001 while he was riding his motorcycle. According to the May 30, 2001 initial medical dictation by his trauma surgeon, Mr. Long was a victim of a "motor vehicle crash involving a car and the patient's motorcycle." Mr. Long's diagnosis, according to his initial hospital medical records included, "E812.2 Other motor vehicle traffic accident involving collision with motor vehicle injuring motorcyclist." His physician's Physical Medicine Rehabilitation dictation from a July 6, 2001 hospital record stated that he had a "motorcycle accident" when he "was hit by an automobile and subsequently was jolted into another automobile." This physician had stated that this information would have been initially provided to him by a knowledgeable witness. In addition, three witnesses' affidavits were also filed and attached at the relevant state court proceedings attesting to the hit and run aspect of Mr. Long's motor vehicle accident. When a motorcyclist is involved in a motor vehicle accident,

the motorcyclist is entitled to Michigan no-fault benefits. *Underhill v Safeco*, 407 Mich 175; 284 NW2d 463 (1979).

Unfortunately the hospital provider billed Mr. Long's motorcycle no-fault insurer, Progressive Insurance Company, and billed Mr. Long's health care insurer, but did not bill or otherwise contact Titan Insurance Company, which was Mr. Long's motor vehicle insurer. After a very long course of hospital treatment, rehabilitation and out-patient treatment, Mr. Long first obtained legal counsel and a conservator more than two years after the motor vehicle accident, shortly after regaining his will to live. His motor vehicle no-fault insurer was then promptly contacted by his counsel for the first time on October 7, 2003 with a telephone call, and subsequently in writing on October 14, 2003.

I. THE UNDERLYING LITIGATION

A. The lower court's decision

Based solely upon the statute of limitations, Respondent Titan Insurance brought its Summary Disposition motion in the lower court under MCL § 2.116 (C)(7)which was granted by the lower court. The lower court relied heavily on the Michigan Court of Appeals decision in *Cameron v ACIA*, 263 Mich App 95 (2004) which held that MCL 600.5851(1) had no applicability to actions brought under the no-fault act. This case did not involve the lifelong loss of no-fault insurance benefits, constitutional issues were not raised, and it is currently pending before the Michigan Supreme Court but Due Process has not been raised.

In Mr. Long's responsive brief in the lower court, he argued that the inflexible application of the one year statute of limitation to plaintiff's claim for no-fault benefits was "unconstitutional" and that it did "not comport with due process."

The lower court's six page opinion addressed this issue and stated, in pertinent part, as follows:

> Finally the Plaintiff argues the inflexible application of a 1 year statute of limitations should provide a person with a reasonable opportunity to commence suit and in this case, there is no evidence the legislature intended to close the door to no-fault benefits for severely injured persons.
>
> The Court has considered the pleadings, the arguments of the parties and the evidence presented but finds pursuant to MCR 2.116(C)(7) that the Plaintiff's claim is barred by MCL 500.3145(1).

B. The Judgment of the Michigan Court of Appeals affirming the lower court.

Again, the constitutional issue was raised and ruled upon by the Michigan Court of Appeals. The Court of Appeals addressed the issue as to whether the application of the no-fault one year statute of limitations to Mr. Long was constitutional, but centered the inquiry around Petitioner's mother and family rather than Petitioner himself. The Opinion stated, "Long's family was aware from the beginning that a motor vehicle may have been involved in the accident." The Opinion concluded that "*she* likewise could have filed a claim with defendant," apparently referring to Mr. Long's mother. It is also uncontested that, other than simply being his mother, Mr. Long's mother didn't become his guardian/conservator until after the time Mr. Long had contacted counsel who then promptly notified his insurer.

The Judgment of the Michigan Court of Appeals stretched to justify depriving Mr. Long of his right of action and insurance benefits by presuming that during the relevant period of time, his "mother" or "family" stood in his shoes and adequately protected his rights. Although it was possible for others to have notified Mr. Long's insurer, the application of

a "possibility test" does not pass constitutional muster. Further, the uncontested facts of the case reveal that unfortunately Mr. Long's family, friends and medical providers did not protect Mr. Long's rights under the Michigan No-Fault Act.

Mr. Long was born on October 31, 1971 and therefore was 29 years old at the time of the motor vehicle accident. He was unmarried, without children, employed full time, and had been living independently on his own for many years prior to the accident. His right to Due Process attaches to him individually, not to his mother or to a presumed generic "family." There is simply no basis in law for the Michigan state court to have concluded that the existence of a mother somewhere, or family members somewhere, or the existence of some possibility through a family, somehow justified eliminating his right to due process or made it "reasonable" to still insist "he" provide written notice of his injuries to his insurer within one year of the accident.

The Michigan Court of Appeals opinion erroneously reasoned that conditioning lifelong no-fault insurance rights upon a comatose or incompetent blind quadriplegic adult man's provision of written notice to his insurer within one year of the motor vehicle accident did not run afoul of the Due Process clause because there were other persons in the world, including Mr. Long's family of origin, who could have possibly done so.

The right of action attached to and belonged to Roger Long exclusively, not his mother or other family members. It was his "property" to protect, and he alone was deprived of it as a matter of law. It was constitutionally infirm for the Michigan Court of Appeals to have used the existence of family members to justify such a harsh and complete deprivation of lifelong health care benefits from such a completely incapacitated and dependent person under the circumstances. No law

justifies this logic or decision and the Due Process clause protects against it.

C. The Michigan Supreme Court's Order denying Petitioner's Application For Leave to Appeal

Without further explanation, the Michigan Supreme Court denied Petitioner's Application for Leave to Appeal the Michigan Court of Appeals' decision. However, the Order did state that two of the Justices would have granted Mr. Long's Application For Leave to Appeal.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS WARRANTED BECAUSE THE STATE COURT BELOW DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

A. The State Court Disregarded Constitutional Limitations on the Application of Statutes of Limitations.

In *Kreiner v Fischer*, 471 Mich 109; 683 N.W.2d 611 (2004), the Michigan Supreme Court recently recalled the expression of policy in their decision in *Shavers v Attorney General*, 402 Mich 554, 578-579; 267 N.W.2d 72 (1978), which stated:

> The goal of the no-fault insurance system was to provide victims of motor vehicle accidents assured, adequate, and prompt reparation for certain economic losses. The Legislature believed this goal could be most effectively achieved through a system of compulsory insurance, whereby every Michigan motorist would be required to purchase no-fault insurance or be unable to operate a motor vehicle legally in this state. Under this system victims of motor vehicle accidents would receive insur-

> ance benefits for their injuries as a substitute for their common-law remedy in tort.
>
> . . . The act's personal injury protection insurance scheme, with its comprehensive and expeditious benefit system, reasonably relates to the evidence advanced at trial that under the tort liability system the doctrine of contributory negligence denied benefits to a high percentage of motor vehicle accident victims, minor injuries were over-compensated, serious injuries were undercompensated, long payment delays were commonplace, the court system was overburdened, and those with low income and little education suffered discrimination.

Yet Roger Long, now a blind quadriplegic because of a motor vehicle accident in Michigan, contrary to the known policies behind the no-fault act, has been denied any no-fault insurance benefits that he paid for through his insurance premiums and to which he is entitled under the no-fault act. His limited health care coverage comes exclusively through welfare. This welfare system does not come close to providing the breadth of lifelong health care to which he is entitled under the no-fault system.

As was generally stated in *Lochner v New York*, 198 U.S. 45, at 56; 25 S.Ct. 539; 49 L.Ed.2d 937 (1905), "there is a limit to the valid exercise of the police power by the state. There is no dispute concerning this proposition. Otherwise, the 14th Amendment would have no efficacy and the legislatures of the states would have unbounded power . . ."

A statute of limitation does not deprive one of property without due process of law, unless, in its application to an existing right of action, it unreasonably limits the opportunity to enforce the right by suit. What is a reasonable period, however, turns upon the nature of the right and particular circumstances. *Logan v Zimmerman Brush Co.*, 455 U.S. 422, 437 (1982) (discussing discretion of States in erecting reasonable procedural requirements for triggering or foreclos-

ing the right to an adjudication); see also *Kentucky Union Co. v Kentucky*, 219 U.S. 140, 156 (1911); *Wheeler v Jackson*, 137 U.S. 245, 258 (1890).

As was explained by this Court in *Logan*, supra at 437:

> The State may erect reasonable procedural requirements for triggering the right to an adjudication, be they statutes of limitations, cf. *Chase Securities Corp.* v. *Donaldson*, 325 U.S., at 314-316, or, in an appropriate case, filing fees. *United States* v. *Kras*, 409 U.S. 434 (1973). And the State certainly accords *due* process when it terminates a claim for failure to comply with a reasonable procedural or evidentiary rule. *Hammond Packing Co.* v. *Arkansas*, 212 U.S., at 351; *Windsor* v. *McVeigh*, 93 U.S., at 278. What the Fourteenth Amendment does require, however, "is 'an *opportunity* . . . granted at a meaningful time and in a meaningful manner,' *Armstrong* v. *Manzo*, 380 U.S. 545, 552 (1965) (emphasis added), 'for [a] hearing appropriate to the nature of the case,' *Mullane* v. *Central Hanover Tr. Co., supra*, at 313." *Boddie* v. *Connecticut*, 401 U.S., at 378. It is such an opportunity that Logan was denied.

Was Roger Long granted an "opportunity" to actualize his no-fault insurance benefits under the no-fault scheme at a "meaningful time and in a meaningful manner?" Of course not.

While Mr. Long was unconscious, while he was medically enduring the life saving treatment of his injuries, including catastrophic brain and spinal cord damage, leaving him to this day blind and quadriplegic, the one year statute of limitations, according to the Michigan courts, did not toll. Instead the statutory clock kept ticking and the procedural door, through which he could not and did not pass, closed irreversibly. He was not personally afforded, under the circumstances and the harsh application of Michigan's no-fault act statute of limitations, any opportunity to actualize his potential no-fault insurance benefits.

Michigan's failure to provide or apply any flexibility or exception, any accommodation or tolling provision for mental disability and for extreme physical disability, runs afoul of the Due Process clause and does not comport with even minimum standards of due process.

To state that the preservation of one's health is an important interest is an understatement. If the Michigan court's decision is not overturned, Mr. Long will not be entitled to much of what the health care system potentially offers. This reduces his potential productivity and enjoyment of life, as well as his likely life expectancy.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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April 27, 2006

APPENDIX

APPENDIX A

MICHIGAN SUPREME COURT,
LANSING, MICHIGAN

[Filed January 27, 2006]

Clifford W. Taylor,
Chief Justice

Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Maura D. Corrigan
Robert P. Young, Jr.
Stephen J. Markman,
Justices

SC: 129118
COA: 260113
Oakland CC: 03-054025-NF

ROGER W. LONG, by and through his mother, Guardian, and conservator, JACKLYNNE EVE LONG,
Plaintiff-Appellant,

v.

TITAN INSURANCE COMPANY,
Defendant-Appellee.

ORDER

On order of the Court, the application for leave to appeal the June 14, 2005 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the questions presented should be reviewed by this Court.

CAVANAGH and KELLY, *JJ.*, would grant leave to appeal.

[Seal] I Corbin R. Davis, Clerk of the Michigan Supreme Court, certify that the foregoing is a true,and complete copy of the order entered at the direction of the Court.

January 27, 2006

Corbin R. Davis
Clerk

APPENDIX B

STATE OF MICHIGAN
COURT OF APPEALS
[Unpublished June 14, 2005]

No. 260113
Oakland Circuit Court
LC No. 03-054025-NF

ROGER W. LONG, by and through his mother, guardian, and conservator, JACKLYNNE EVE LONG,
Plaintiff-Appellant,

v.

TITAN INSURANCE COMPANY,
Defendant-Appellee.

Before: Talbot, P.J., and Zahra and Donofrio, *JJ.*

PER CURIAM.

Plaintiff, as guardian and conservator for her injured son Roger Long, appeals as of right from the trial court's order granting defendant summary disposition under MCR 2.116(C)(7) based on the no-fault act's one-year limitation period, MCL 500.3145(1). We affirm.

A trial court's grant of summary disposition is reviewed de novo to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v. Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999).

When reviewing a dismissal on the basis that a claim is barred by the statute of limitations, or any other grounds listed in MCR 2.116(C)(7), this Court accepts all well-pleaded factual allegations as true, unless contradicted by other evidence, and construes them in favor of the nonmoving

party. *Maiden, supra* at 119; *Guerra v Garratt*, 222 Mich App 285, 289; 564 NW2d 121 (1997). The court must consider the affidavits, depositions, admissions, and any other documentary evidence submitted by the parties. MCR 2.116(G)(5); *Maiden, supra* at 119; *Guerra, supra* at 289. If no facts are in dispute, or if reasonable minds could not differ regarding the legal effect of those facts, then the question whether the claim is barred is an issue of law. *Guerra, supra* at 289.

Section 3145(1) of the no-fault act, MCL 500.3145(1), provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury *may not be commenced later than 1 year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within 1 year after the accident* or unless the insurer has previously made a payment of personal protection insurance benefits for the injury. If the notice has been given or a payment has been made, the action may be commenced at any time within 1 year after the most recent allowable expense, work loss or survivor's loss has been incurred. However, the claimant may not recover benefits for any portion of the loss incurred more than 1 year before the date on which the action was commenced. The notice of injury required by this subsection may be given to the insurer or any of its authorized agents by a person claiming to be entitled to benefits therefor, or by someone in his behalf. The notice shall give the name and address of the claimant and indicate in ordinary language the name of the person injured and the time, place and nature of his injury. [Emphasis added.]

Plaintiff argues that there is a question of material fact whether defendant received notice of Roger Long's accident

within the prescribed one-year period. We disagree. Although a witness, Susan St. Pierre, stated in a telephone interview more than two years after the accident that she had spoken to an insurance company representative within a few months after the accident, she did not know what insurance company the agent represented, and there is no evidence that the caller was one of defendant's agent. Indeed, it was most likely a representative of Progressive Insurance Company, Long's motorcycle insurer, given that plaintiff filed a claim with Progressive shortly after the accident. More significantly, there is no evidence that defendant received *written* notice of the accident from anyone. See *Keller v. Losinski*, 92 Mich App 468, 471-473; 285 NW2d 334 (1979) (mere oral notice is insufficient). We, therefore, conclude that St. Pierre's telephone statement is insufficient to create a question of material fact concerning whether defendant received written notice of the accident within one year of the accident as required by § 3145.

We also reject plaintiff's argument that the trial court erred in following *Cameron v. Auto Club Ins Assn*, 263 Mich App 95; 687 NW2d 354 (2004), lv gtd 472 Mich 899 (2005), thus concluding that plaintiff could not rely on the tolling provision in the Revised Judicature Act (RJA), MCL 600.5851(1), which is applicable to persons who are insane. Section 5851(1) provides:

> Except as otherwise provided in subsections (7) and (8),[1] if the person first entitled to make an entry or bring an action under this act is under 18 years of age or insane at the time the claim accrues, the person or those claiming under the person shall have 1 year after the disability is removed through death or otherwise, to make the entry or bring the action although the period of limitations has run.

---

[1] Addressing minor claimants.

Section 5851 has a long history. In the 1915 Judicature Act, § 5851(1) stated that its savings provision applied to ,"any of the actions mentioned in this chapter." Accordingly, it "did not apply to statutes that provided their own limitations period." *Cameron, supra* at 99. In 1961, the Legislature adopted the RJA, and changed the relevant language of § 5851(1) from "any of the actions mentioned in this chapter" to "any action." *Id. In Rawlins v. Aetna Casualty & Surety Co*, 92 Mich App 268, 274-277; 284 NW2d 782 (1979), this Court held that, as amended in 1961, § 5851(1) applied to the one-year statute of limitation contained in § 3145 of the no-fault act. See *Cameron, supra* at 99-100; *Professional Rehabilitation Assoc v. State Farm Mutual Automobile Ins Co*, 228 Mich App 167, 168-169, 174-176; 577 NW2d 909 (1998).

In 1993, the Legislature again amended the relevant language of § 5851(1), changing its scope from "an action" to "an action under this act." *Cameron, supra* at 100. The Court in Cameron determined that the Legislature intended to restrict the scope of § 5851(1) to only actions brought under the RJA and, therefore, concluded that § 5851(1) no longer applied to actions brought under the no-fault act, which contains its own statute of limitation in § 3145. *Id.* at 100-103.

In *Cameron*, this Court explicitly rejected the argument that "if the Legislature had intended to change the law and make [§ 5851(1)1 no longer applicable to no-fault cases, then some record of that intent would appear in the legislative history." *Id.* at 103. This Court noted that our Supreme Court has rejected attempts to contradict the clear language of a statute based on "a judicial theory of legislative befuddlement." *Id.* "Thus, the fact that the legislative history is silent with regard to the potential ramifications stemming from the change . . . plays no part in the proper interpretation of the provision." *Id.* Similarly, we will not speculate based on mere silence in the legislative history that the challenged language was inadvertently or accidentally inserted into the statute.

We are bound to follow the rule of law established in *Cameron*, MCR 7.215(J)(1), and are not persuaded that *Cameron* was decided incorrectly.

Next, we disagree with plaintiff's argument that § 3145 is unconstitutional. Constitutional questions are reviewed de novo. *In re Hawley*, 238 Mich App 509, 511; 606 NW2d 50 (1999).

As defendant observes, this Court has held that the no-fault act's one-year limitation period advances legitimate government interests and, therefore, does not violate due process. See *Dolson v. Assigned Claims Facility*, 83 Mich App 596, 598-600; 269 NW2d 239 (1978). The cases cited by plaintiff do not require a different conclusion.

In *Chase v. Sabin*, 445 Mich 190, 195; 516 NW2d 60 (1994), our Supreme Court stated that a statute of limitations "should provide plaintiffs with a reasonable opportunity to commence suit." Thus, where the plaintiff's doctor failed to disclose complications that arose during surgery, the Court applied the discovery rule to extend the plaintiff's time to sue although the literal language of the statute would have barred the action before plaintiff was aware that he had a cause of action. *Id.* at 195-197. In the present case, a police report and the medical records indicate that Long's family was aware from the beginning that a motor vehicle may have been involved in the accident. Additionally, a claim was filed on Long's behalf with Progressive Insurance Company, his motorcycle insurer. Because plaintiff was timely aware that an automobile may have been involved and was able to file a claim with Progressive, she likewise could have filed a claim with defendant. We therefore conclude that, unlike in *Chase*, plaintiff's claim against defendant was not unfairly barred before plaintiff was aware that it existed.

In *Grubaugh v. City of St Johns*, 384 Mich 165, 169-177; 180 NW2d 778 (1970), the Supreme Court held that a statute

requiring written notice before filing suit against a municipality was violative of procedural due process because it impaired the plaintiffs vested right to sue. Here, however, the statute did not deprive plaintiff of a vested right to sue. It merely required that she either provide notice or file suit within one year. Thus; *Grubaugh* is also inapposite.

This Court has held that "statutes of limitation are to be upheld [against due process challenges] unless it can be demonstrated that their consequences are so harsh and unreasonable that they effectively divest plaintiffs of the access to the courts intended by the grant of a substantive right." *Bissell v. Kommareddi*, 202 Mich App 578, 581; 509 NW2d 542 (1993). In the present case, plaintiff had a year to either sue or notify defendant of Long's accident. Additionally, under § 3145, complying the notice provision would have allowed plaintiff to sue "within 1 year after the most rent allowable expense," although limiting recovery to damages incurred within a year before filing suit. The provisions of the statute are not so harsh and unreasonable as to effectively divest plaintiff of access to the courts. Accordingly, the trial court did not err in finding that § 3145 did not deprive plaintiff of due process.

Lastly, plaintiff argues that the trial court erred in declining to apply the doctrine of equitable tolling. We disagree. Equitable issues are also reviewed de novo. *Webb v. Smith (After Remand)*, 204 Mich App 564, 568; 516 NW2d 124 (1994).

In *Bryant v. Oakpointe Villa Nursing Centre, Inc*, 471 Mich 411, 414-417; 684 NW2d 864 (2004), the plaintiff asserted negligence claims against a nursing home arising from the asphyxiation death of a resident who became entangled in her bedding and bedrails. After deciding that some of the plaintiffs claims sounded in medical malpractice, not ordinary negligence, the Supreme Court examined whether the claims were time-barred. See *id.* at 432433.

Although observing that the malpractice claims would ordinarily be time-barred, the Court concluded that "[t]he equities of this case . . . compel a different result." *Id.* at 432. The Court noted that the distinction between negligence and malpractice claims continued to trouble the bench and bar and found that the "[p]laintiff's failure to comply with the applicable statute of limitations is the product of an understandable confusion about the legal nature of her claim, rather than a negligent failure to preserve her rights." *Id.* The Court, therefore, concluded that the plaintiffs medical malpractice claims may proceed to trial along with the plaintiffs ordinary negligence claim. *Id.* The Court did not refer to the equitable tolling doctrine by name, or discuss or explain it further.

In the present case, there is no indication that plaintiffs failure to comply with the one-year limitation period was the product of understandable confusion concerning the nature of Long's claim. We, therefore, agree with the trial court that *Bryant* does not provide persuasive authority for allowing equitable tolling of the statute of limitations in this case.

Affirmed.

/s/ Michael J. Talbot
/s/ Brian K. Zahra
/s/ Pat M. Donofrio

APPENDIX C

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

[Filed Dec. 20, 2004]

Case No. 03-054025 NF
Hon. Wendy Potts

ROBERT W. LONG, by and through his Mother, Guardian and Conservator, JACKLYNN EVE LONG,
Plaintiff,

v.

TITAN INSURANCE COMPANY,
a Michigan Corporation,
Defendant.

OPINION AND ORDER

At a session of Court held in the City of Pontiac, County of Oakland and State of Michigan on Dec. 17 2004.

HONORABLE WENDY FOTTS, *Circuit Court Judge.*

This matter is before the Court on a Motion for Summary Disposition, filed by the Defendant, pursuant to MCR 2.116(C)(7) and (10). In response, the Plaintiff filed a Counter-Motion seeking an order declaring that he is entitled to no-fault Benefits. For the reasons stated below, the Defendant's Motion is GRANTED and the Plaintiffs Motion is DENIED.

The Plaintiff filed this action seeking no-fault benefits arising out of a motorcycle accident which occurred in May of 2001. The Plaintiff was seriously injured as a result of the accident. A-police report-indicates there was no motor

vehicle involved in the accident. (See Defendant's Exhibit 1). However, the Plaintiff argues medical records and eyewitnesses reveal a motor vehicle may have been involved in the accident.

If a motor vehicle accident was involved in the accident, the Plaintiff would have been entitled to no-fault benefits from his auto insurer, the Defendant, had he made a timely claim.

The Defendant received notice of the Plaintiffs claim for no-fault benefits in October of 2003, more than 2 years after the motorcycle accident occurred. The Plaintiffs claim was denied based on the 1 year notice provision set forth in MCL 500.3145.

The Defendant argues whether or not an automobile was involved in the accident is irrelevant because even if a motor vehicle was involved, the 1 year notice provision, MCL 500.3145 bars the Plaintiffs claim.

MCL 500.3145(1) provides:

> An action for recovery of personal protection insurance benefits payable under this chapter for accidental bodily injury may not commence later than one year after the date of the accident causing the injury unless written notice of injury as provided herein has been given to the insurer within one year after the accident or unless insurer has previously made a payment of personal protection insurance benefits for the injury . . . . .

As stated earlier, the Plaintiff in this case did not give the Defendant notice of any injury or claim until more than 2 years after the accident and there was no payment of personal protection benefits for the injury.

The Defendant further argues the 1 year notice limitation was not tolled by the insanity provision of the Revised Judicature Act ("the RJA"), MCL 600.5851. More specif-

ically, in *Cameron v. ACIA*, 263 Mich App 95 (2004), the Court held the insanity tolling provision of the RA is not applicable to actions brought under 'the no-fault Act because the no-fault Act has its own periods of limitation.

In response to the Defendant's Motion the Plaintiff argues another vehicle was involved in the accident. More specifically, the Plaintiff claims he was side swiped by an unidentified motor vehicle causing him to lose control of his motorcycle. Although not the only evidence provided, the Court notes the strong reliance by the Plaintiff on medical records to support his assertion that another vehicle was involved in the accident. However, the medical records which describe the cause of the accident are inadmissible hearsay. More specifically, the medical personnel who prepared those records have no first hand knowledge of the accident.

The Court finds the cause of the accident is not relevant to the legal issue presented in this Motion and Counter-Motion regarding the timeliness of the Plaintiffs claim.

The Plaintiff next argues that this Court should apply its equitable powers and equitably toll the one year no-fault Act statute of limitations, despite the Court's ruling in *Cameron v. ACIA, supra*. The Plaintiff notes this case can be distinguished from *Cameron*, because in *Cameron*, the Court of Appeals was not faced with a plaintiff who was forever foreclosed from the possibility of receiving no-fault benefits. Rather, the Court in *Cameron* only limited benefits to one year back before the filing of the Complaint. Furthermore, according to the Plaintiff, the Court in *Cameron*, ignored the doctrine of equitable tolling.

The Plaintiff argues common law equitable tolling and a very strong public policy favoring coverage under the No-Fault Act should save his claim. According to the Plaintiff, in *Bryant v. Oakpointe Villa Nursing Centre*, 471 Mich 411 (2004), the Court addressed the issue of equitable tolling and

found although a statute of limitations had lapsed, the equities in the case compelled a different result.

Finally, the Plaintiff argues the inflexible application of a 1 year statute of limitations to the Plaintiffs claim is unconstitutional. More specifically, the Plaintiff argues a statute of limitations should provide a person with a reasonable opportunity to commence suit and in this case, there is no evidence the legislature intended to close the door to no-fault benefits for severely injured persons.

The Court has considered the pleadings, the arguments of the parties and the evidence presented but finds, pursuant to MCR 2.116(C)(7) that the Plaintiffs claim is barred by MCL 500.3145(1).

The Court is sympathetic to the Plaintiffs situation. However, MCL 500.3145(1), which provides for a 1 year period of limitations is clear and unambiguous and thus the Court must apply the statute to this case. Furthermore, the constitutionality of the statute has already been determined. See *Dolson v. Assigned Claims Facility, Secretary of State*, 83 Mich App 596 (1978). The fairness of the statute must be addressed by the legislature and not the Court.

Furthermore, the Court of Appeals has declared in *Cameron v. ACIA, supra*, that the RJA's tolling provision is not applicable to the no-fault Act. With respect to this issue, the Court also notes no evidence was presented that the Plaintiff was insane or had a cognitive disorder which would have tolled the period of limitations. The RJA, MCL 600.5851(1) only provides for the tolling of the accrual of a claim based on the disability of infancy or insanity. Thus, the Plaintiffs claim likely would not have been saved by the RJA's tolling provision, even had *Cameron* not been decided.

Finally, the Court finds the facts and circumstances in *Bryant v. Oakpointe Villa Nursing Centre, supra*, are not consistent with the facts and circumstances in this case. In

Bryant, the Plaintiff filed a lawsuit alleging negligence. However, the Defendant sought dismissal arguing the Plaintiffs claim sounded in medical malpractice and not ordinary negligence and was barred by the 2 year period of limitations. The Michigan Supreme Court found the claim was for malpractice and that under ordinary circumstances, the Plaintiffs claim was filed after the period of limitations lapsed. However, the Court determined the equities in the case permitted the late filing because case law had not been clear in distinguishing between actions sounding in medical malpractice and those sounding in ordinary negligence. The Court noted the Plaintiffs failure to comply with the applicable statute of limitations was the product of understandable confusion about the legal nature of her claim rather than a negligent failure to preserve her rights.

In this case, there is no confusion over the nature of the Plaintiffs claim or the period of limitations. The Plaintiffs claim is clearly for first party no-fault benefits and is governed by a 1 year period of limitation.

Thus, for the reasons just stated, the Defendant's Motion is GRANTED and the Plaintiffs Counter-Motion is DENIED.

IT IS SO ORDERED.

/s/ Wendy Potts
WENDY POTTS
Circuit Court Judge

Dated: Dec. 17, 2004